



COTS Software Licensing

Software License Agreement Best Practices

September 2015

EULA Key Clauses - Overview

License Grant	Pricing	Warranty	Maintenance	General Provisions
Parties	Financial Investment	What is Covered?	Scope & Levels of Support	Order of Precedence
Requirements				Confidentiality
Product Names & Functions	Metric	Who is Covered?	Timing & Duration	Integration
Duration	Discount	Duration	Rates	Term
Permitted Use	Key Terms	Remedies	Escalation	Termination
Authorized Users	Benchmarking			Governing Law
Geography				Dispute Resolution
Language				Assignment
Quantity				Relationship of the Parties
Self Audit				Limitation of Liability
Times of Conflict				Severability
Ownership & Use Rights				

EULA Key Clauses / License Grant

License Grant

Pricing

Warranty

Maintenance

General Provisions

Core License Grant Elements



Parties

Authorized Users



Requirements

Geography

Times of Conflict



Product Names
& Functions

Language



Duration

Quantity

Ownership &
Use Rights



Permitted Use

Self Audit

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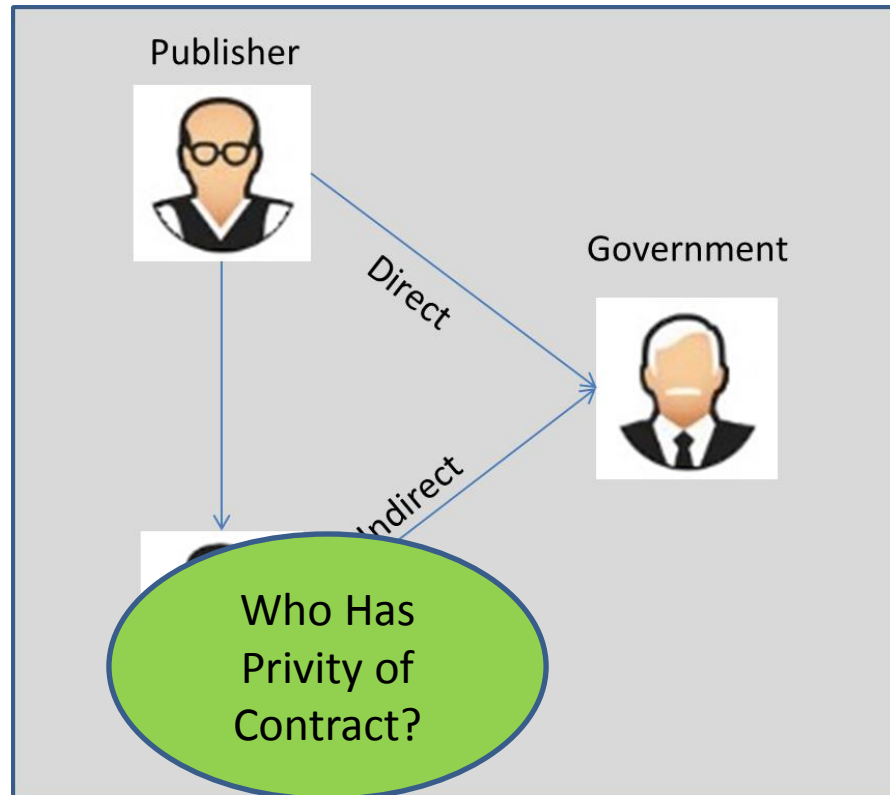
Parties

Who is authorizing and entering this EULA?

RECAP:

Privity is a _____ that exists between two or more _____ to an agreement.

_____ is required for one party to _____ the contract against the other party.



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Parties

Poor Position

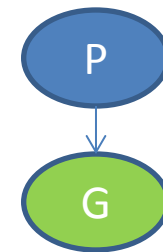
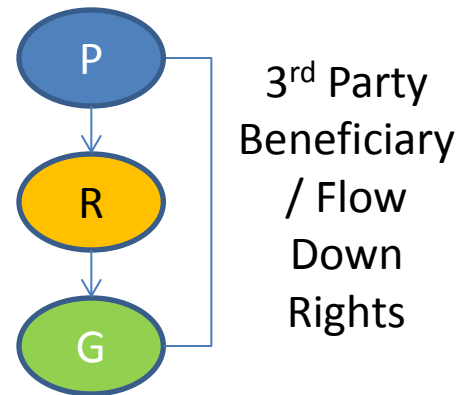
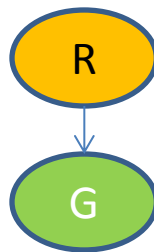
Zone of Compromise

Buyer's Best Position

The Government Buyer and the _____ are the sole parties

The Government Buyer is made a third party beneficiary to the agreement between the _____ and the _____

The _____ is a direct party to the license with the government



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Requirements

The contract needs to clearly define the customer's requirements for the software.



1. Fit Within the Acquisition Life-Cycle

2. What Are Requirements?

3. Why Are They Important?

4. Pitfalls of Bad Requirements

5. Keys to Consider

6. Team Approach

Fit with Acquisition Cycle



What Are Requirements?

What are
Requirements?

- A list of issues or problems with the way you are currently performing a function or operation
- The end-goal of the system or solution you seek
- Detailed functionality and capabilities you need to achieve your end-goal system or solution

The Definition Depends on the “Definer”

- Commercial Buyer’s Definition
 - One document with many purposes and applications
- Seller’s / Offeror’s Definition
 - The details a vendor needs in order to give a price and terms to deliver a solution
- Government Buyer’s Definition
 - Many documents required in the acquisition process

What Does
“Requirements”
Mean to You?

What Are Requirements in our Everyday Lives?

What are
Requirements?

Sample shopping lists from a spouse – reasons why
conflicts can arise when written poorly

Shopping List A:

- *Eggs*
- *Milk*
- *Cheese*
- *Soda*

Shopping List B:

- 12 Organic Brown Eggs from Trader Joe's
- One gallon of Rosenberg's skim milk with expiration date of no earlier than 4/30
- One-half pound of Land 'O Lakes American Cheese as long as it's under \$5 per pound
- Two 12 packs of 12 ounce caffeine free Diet Coke in cans

Shopping List C:

- Groceries (vague and non-specific)

How Would this Shopping List be Expressed in Government?

Shopping List D-1:

What are
Requirements?

- 12 Organic Brown Eggs from Trader Joe's
 - Organic 7 CFR §205.2 (Terms defined)
 - Trader Joe's
 - FAR 8.002 (Required Sources of Supplies and Services, Priorities for use of Government supply sources)
 - FAR 9.104-1 (Responsible Prospective Contractors, General Standards)
 - FAR 19.502-2 (Total small business set-asides)
- One gallon of Rosenberg's skim milk with expiration date of no earlier than 4/30
 - FAR 6.302-1(c) (Only one responsible source and no other supplies or services will satisfy agency requirements, Application for brand name descriptions)
 - 7 U.S.C. 4502(e)) (Dairy Production Stabilization Act of 1983)
 - FAR 32.904 (f) (Determining payment due dates, Food and specified items)

Requirements will determine:

- The best solution
- Correct quantity
- Product / License type
- Acquisition approach
- Negotiation strategy
- Best price

Bad Solutions Come from Bad Requirements

- Difficult to acquire products with a good fit to actual requirements.
- Can lead to low product satisfaction.
- Can lead to performance issues, project overruns and claims for damages.

If you cannot describe exactly what you need, you won't know what to buy, how to get it, who to get it from, or how to tell when you get it.

Delays the Solicitation and Award Process

- Poor product fit can lead to longer and less efficient procurements
- Can result in inadequate competition and unfavorable pricing

Shifts Risk to the Drafter of the Requirement

- Legal principle – “Ambiguities will be construed against the drafter”
- Cause vendors to shift risk with assumptions and unfavorable terms and conditions and higher price.

If you don't do an excellent job on a PWS, SOO, SOW, PSOW, etc; how do you expect a vendor to deliver what you want and need

Keys to Consider

Keys to Consider

- If you don't know your requirements, then stop and go figure out your requirements and why you are going to spend money. Don't spend the money until you know your requirements.
- Invest the time up front to get the requirement right and avoid all the rework after contract award.
- One method is to have an internal group (not associated with your acquisition) review your requirements and draft their response based on what you wrote.
- Remember the “Four Corners of the Contract” rule – you only are entitled to what you put in the Contract/PWS.

“The best contract in the world can not fix a poorly worded, under funded requirement”, Brig General Slinkard

Team Approach to Defining Requirements

Team Approach

Identify how the team concept helps with requirements definition.
Name the common attributes of a good requirements team.

- Skills needed
- Experience needed
- Representative of (what groups?)
- Government / contractor mix
- Number of people
- Parameters / Guidelines / Principles
- Project Management disciplines:
 - goals, meetings, agendas, status, issues log, timeline

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Product Names
& Functions

What products will meet the customer's requirements?

By identifying the business process you want to automate, you place some responsibility on the software company to perform that process using their software.

BUSINESS PROCESSES	MODULES AND SUB-MODULES
<ul style="list-style-type: none">▪ Financial Reporting▪ Management Reporting▪ Closing Process▪ Internal project tracking▪ Entry of vendor invoices▪ Check Printing▪ Bank integration for ACH and wires▪ Employee expense reimbursement▪ Inter-company tracking▪ Cost Center Planning▪ Balance Sheet Planning▪ P&L Planning (EXCEL Upload Capability)• Consolidations (minimal requirements)	<ul style="list-style-type: none">▪ FI and CO Organizational Structures▪ FI-General Ledger▪ FI- Accounts Payable▪ FI- Bank Accounting▪ CO- Cost Center Accounting▪ CO- Profit Center Accounting▪ CO- Overhead Cost Controlling▪ CC, B/S and P&L▪ SEM-BCS for Financial Consolidations for Four legal entities▪ Business Intelligence to support reporting and plan vs. actual reports▪ Portal to support reporting through Business Intelligence▪ Solution Manager to support environment management▪ GRC to support access control management

By identifying the software modules you need to buy, the software company is making a representation that the business process can be performed by using that module.

This is a complete list of all software required to perform the business processes of x, y and z

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Product Names
& Functions

Requirements

Demo in Person

Gap Analysis

A	B	C			D	E	F	G	H	I
REQUIREMENT REFERENCE	BUSINESS PROCESS	LICENSOR'S PRODUCT FIT			PRODUCT NAME	LICENSE TYPE*	UNIT PRICE	QUANTITY	TOTAL PRICE	THIRD PARTY PRODUCT(S) REQUIRED* (Y/N)
		FIT (YES)	FIT (NO)	Other				*If yes, then list third party brand name and products required		
1 - Allows download of banking data	Bank account reconciliation	X			QuickBooks Pro	Annual Subscrip	\$850	30	\$25,550	N
2 - Exports data to bank system	Bank account reconciliation		X		N/A					
3 – Print Checks	Payment Processing			X	Custom Sub- routine					

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Duration

How long can the software be used?

PERPETUAL



TERM /
SUBSCRIPTION



Duration of Licenses

- There are two primary license models – Perpetual and Term
 - A **Perpetual License** means the license is owned into perpetuity. The full price is usually paid at delivery.
 - A **Term License** means the license is owned for a specific period of time. The price is often paid in annual increments, also referred to as **Subscription Licenses** - often used for SaaS licenses.

Perpetual license

Price = \$1 million invoiced at delivery



$t = \text{infinity}$

Subscription License – Four year term

Price (software component) = \$250,000 annually



$t=0$ Yr 1 Yr 2 Yr 3 Yr 4

Key take-away

If your time horizon for the license is not the same as the pricing model used by the Vendor, you might overpay significantly.

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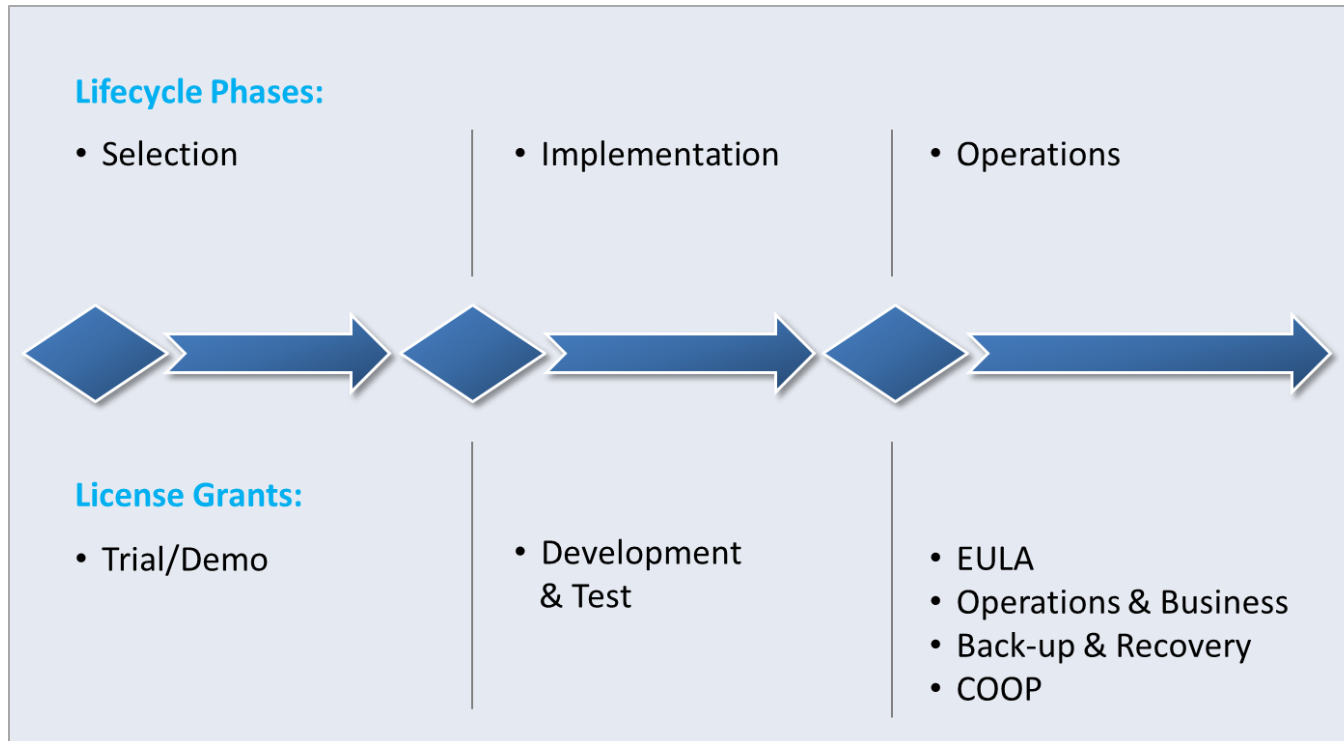
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Permitted Use

For what purposes can the software be used?



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Authorized Users

Who can use the software?



Remember contractors, foreign governments, reservists, & casual users

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Geography

Where can the Software be used?



Default position = “worldwide” rights to use

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Language

What languages will the user community understand?

- *Software*
- *Support Team*
- *Screens / Fields*
- *Training Classes*
- *Documentation*



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Quantity

How many copies of the software can be used?

1. Number of licenses you are buying
2. Duplicate copies allowed



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Self-Audit

How will you know that the allowable quantities are being used?



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Self-Audit

Greater success
in getting “self-
audit” rights if
you show you
have ITAM
process and
tools in use.

- ☐ Audit will be done by the government on its own systems.
- ☐ Will be performed no more than once per year.
- ☐ Seller will not be allowed to perform an audit on government systems.
- ☐ Government will provide results of its audit upon request by publisher no more than once per year.

Publisher Position

Publisher may
perform audit
anytime

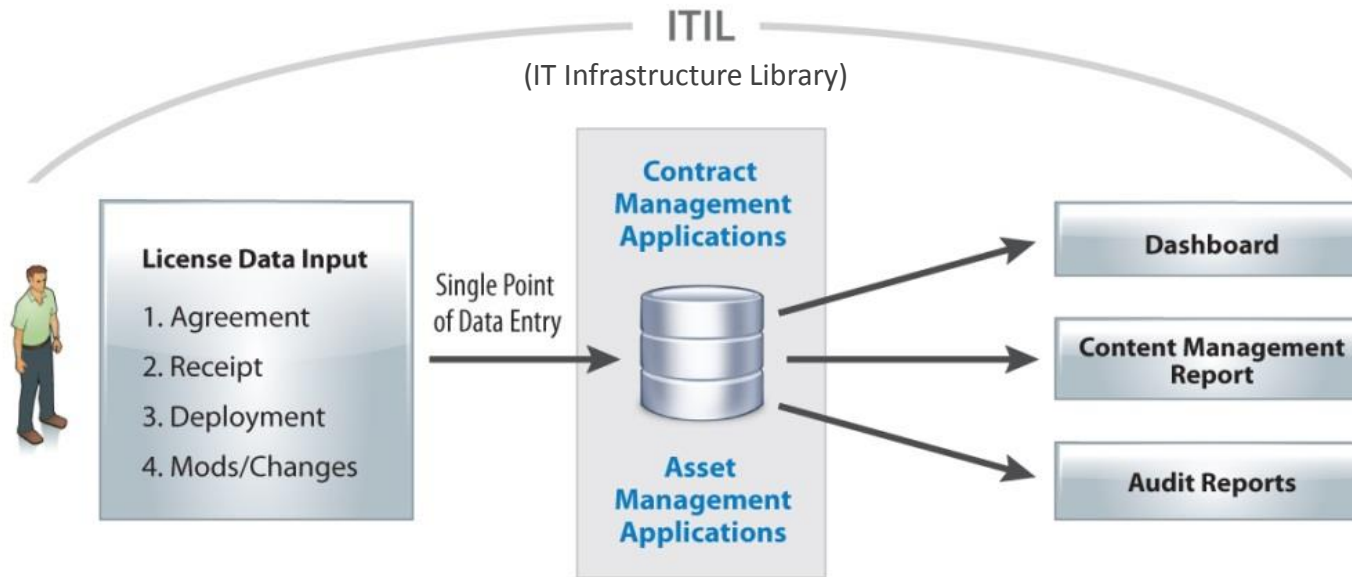
Third party may
perform audit
with conditions

Buyer's Position

Government will
perform audit

Zone of Compromise

NOTE: Self-Audit Requires Solid ITAM & SAM Capabilities



Why Use ITIL?

- ITIL provides a comprehensive set of disciplines and processes for the orderly management of IT assets and services within an organization.

Why Change Management?

- ITIL-based Change Management processes ensure changes to the IT infrastructure are authorized, tested, and deployed properly—thereby retaining environment integrity.

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Times of Conflict

What additional licenses are needed?



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Ownership &
Use Rights

_____ Always Owns the Exclusive Rights to its Data
_____ Owns Enhancements or Modifications to the Licensed Software

Developer

•
Development Tools
= Developer Property
(ala Toolbox)

**Who Owns The IP
Rights to Works
Derived from the
Software?**

Who Owns IP?

•
(e.g. Core COTS SW
Application Licensed
for Commercial Use)

COTS

Resale May Be Restricted

Rights Can Be Jointly Owned

Hybrid or Derivative Works

Who Owns IP?

•
(Design, Development,
Test & Deployment)

Custom Development

(Work for Hire)

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Core Pricing Elements



Financial
Investment



Metric



Discount



Key Terms



Bench-
marking

EULA Key Clauses / Pricing

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Financial
Investment

License or Subscription Price

Maintenance and Support Price

Training or Other Services Price

License Pricing Models – Basic Approach

Duration

☐ Specified Term
Month | Year

☐ Perpetual
Forever

Note: *Virtualization and Unlimited Issues*

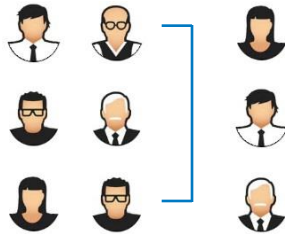
Who Can Use? Count & Scope

Named User



Only this individual may use this license (e.g., professional, self service)

Concurrent User



Anyone can use these set number of licenses as long as no more than x use them at the same time

Processor / Core Based



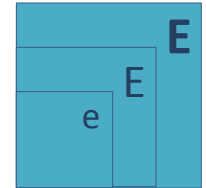
Based on number of processors or cores in CPU

Site



Licenses may only be used at this geographic location

Enterprise



Licenses may be used across the enterprise as defined in the agreement

How Managed / Delivery Model

On Customers Premises

☐ Customer's Servers

☐ Private Cloud

☐ On Vendors Premises
(Public Cloud)

☐ Hybrid

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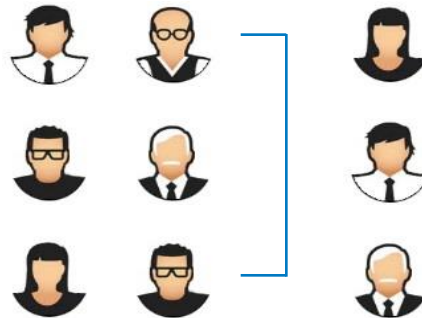
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Metrics

2000 people have a legitimate need to use the software.



Maximum user count at any point in time would be 500.

Your system utilizes 32 processors.



Per Named User
= \$100.00

Per Concurrent User
= \$500.00

Per Processor
= \$10,000.00

Given the above quantities per Licensing Metric, identify the Metric that meets total licensing requirements at the lowest price given the prices shown above.

Software Cost and Price Impact

- A software Company has a huge investment in their intellectual property and continues to invest in improving their software, mostly through a pool of software developers (and related functions) improving the functionality.
 - This pool of developers is essentially a fixed cost; it does not vary (immediately) based on how many copies/licenses of software are sold.
- What is the Marginal Cost (***the cost of producing one more unit***) of selling an additional \$1M of licenses?
 - State that in Percentage (%) terms.
 - What types of cost comprise the marginal cost of the sale?

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Discount

Size of Order (List)	Discount Off List	Comments
\$1 - \$9,999	10% - 30%	GSA/ESI (Based on Qty 1)
\$10,000 - \$49,999	20% - 40%	Perhaps Better than GSA/ESI
\$50,000 - \$249,999	25% - 50%	Additional Discount from GSA/ESI
\$250,000 - \$999,999	35% - 60%	Likely a Field Sales Transaction
\$1,000,000 - \$9,999,999	45% - 75%	Large Transaction for the Publisher
\$10,000,000 - \$99,999,999	60% - 90%	Significant Corporate Attention
\$100,000,000+	75% - 95%	One of Top Transactions for Year

EULA Key Clauses / Pricing

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Maximize Buying Event



Time Order

Maximize
Transaction
Size

Right Metric
/ License
Model

Contract
Vehicle

Benchmark
Data

Remove
Contingencies

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Total Cost of Ownership (TCO)

REQUIREMENTS
/ FIT

PRICE

TERMS &
CONDITIONS

Terms & Conditions (relating to Price)

Discount Pricing for
Additional Products

No Transfer or
Relocation Charges

Discount Education
and Services

Discount
Maintenance Rates
for New/Existing
Licenses

Most Favored
Customer Provision
and GSA Price
Reduction Clause

Low or Waived
Escalation of Future
Maintenance Rates

Extra Warranty
(cost)

Transfer Right (cost)

Self-Audit Right
(cost)

EULA Key Clauses / TCO Offer Example

	% Fit	Price	Key Terms	Maintenance
Deal A	70%	\$1M	Warranty – Vendor Standard Clause	3 years at 18% 5% escalation
Deal B	80%	\$1.5M	Warranty – Meets Government's Requirements	5 years at 20% 2% escalation

What are the pros and cons of each offer?

How would you analyze these two offers?

EULA Key Clauses / Pricing

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Best Value Tools





Best Value
Price Factors Guide




Home Overview How to Use Rapid Assessment Bes

Tools Library

A direct link to tools utilized throughout the Best Value toolkit are available below:

Tool	Purpose	Link / Type
Benchmark Data Gathering Checklist	Summary Level Guidance on Benchmarking	
Benchmarking Elements Table	Key elements to be gathered to compare benchmark data	
Best Value Price Factors Guide	Review of items that drive the price of commercial software, oriented towards Vendor's flexibility to grant better pricing based on Government's position.	
Best Value Terms and Conditions Guide	In-depth review of critical Ts & Cs, applicability, risk identification, and identification of where the term or condition likely appears in contractual documents.	
Contract Vehicle Utilization Checklist	Identification of available contract vehicles with guidance on their	



Best Value Toolkit

Best Value Price Factors Guide

Price Factor	Importance	Objective	Rationale & Recommendations
Dollar Value Size of Immediate Order	+++	Execute the largest order that makes sense from requirements and TCO perspectives, with maximum immediate revenue to the Vendor/Publisher.	<p>Software vendors are attracted to size, specifically the amount of revenue they can immediately book. The larger the transaction, the greater discount the Vendor/Publisher will offer.</p> <p>However, do not buy more than needed, and evaluate all alternatives using Total Cost of Ownership (TCO)/Life-Cycle Cost Estimate methodologies.</p> <p>One way to achieve greater size than initially expected is to consolidate with another entity planning a similar acquisition.</p> <p>Periodic, aggregate purchasing provides significantly better discounts than one-off buying.</p>
Budget	++	Establish an aggressive yet realistic budget for the acquisition.	<p>Assume that the Vendor/Publisher will find out the budget and structure (within reason) their offer to fit the available budget. It is almost as if you need to establish "Best Value" Pricing prior to publishing the budget.</p>

EULA Key Clauses / Warranty

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Core **Warranty** Elements



What is Covered?



Who is Covered?



Duration



Remedies

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Products will meet a standard of performance

Sellers will fix or replace defective products

Refund money if unable to fix defect

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Commercial Product Warranties

Implied

Express

Merchantability

Fitness for
Particular Purpose

These implied warranties automatically apply to all sales of commercial software to the government through FAR section 52.212-4 (o).

What is Covered

Who is Covered

Timing / Duration

Defect Remedy

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What is Covered?

Express Warranty

The Seller's Commitment
in the EULA

Performance Warranty

"The product will
perform as specified in
the documentation"

What Documentation?

Buyer's Preferred
Documentation

Seller's Preferred
Documentation

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Who Issues the Warranty?

Who is Covered by the Warranty /
Who Can Enforce It?

RECAP:

Contract Provisions Where Privity with the Publisher Matters:

- License Grants
- Transferability of Licenses
- Source Code Escrow
- Ownership of Derivative Works
- **WARRANTY**
- Level 3 Support
- IP Indemnification

Publisher



Flow Down



Reseller

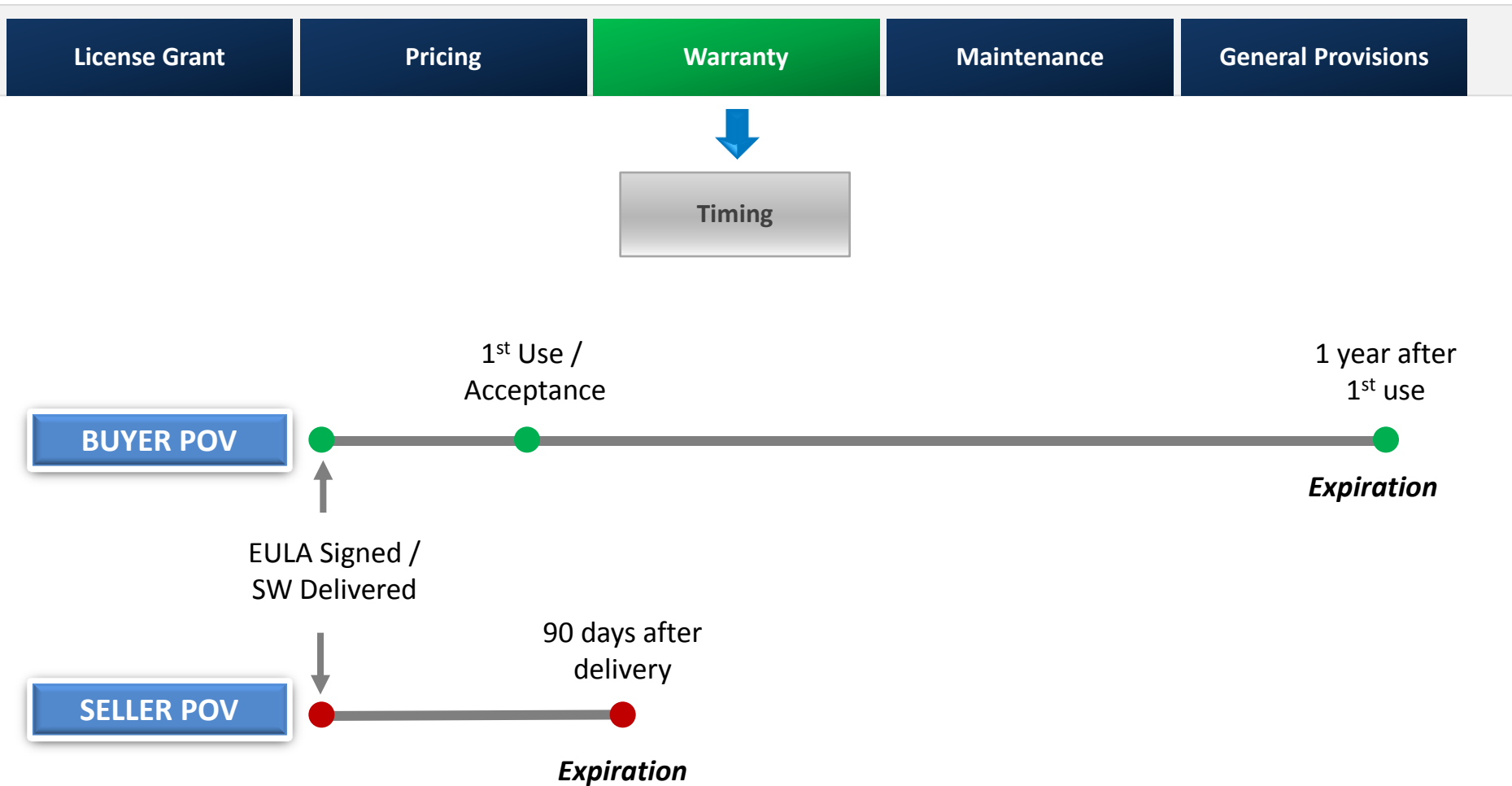
Direct

Indirect

Government



EULA Key Clauses / Warranty



EULA Key Clauses / Warranty

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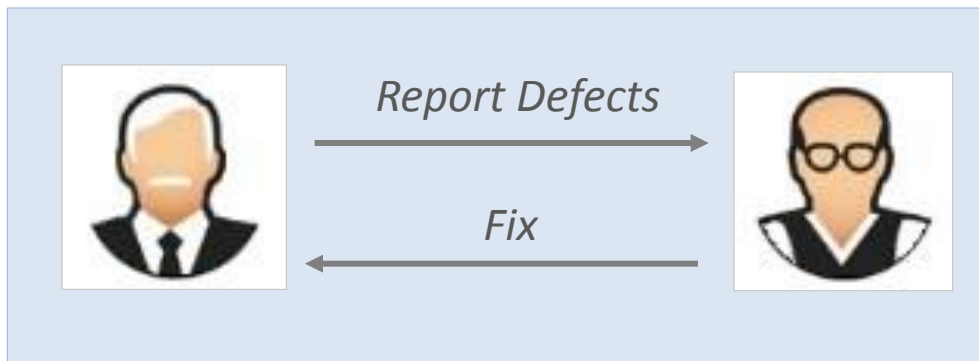
Maintenance

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Remedies

Process for Reporting and Fixing Defects



- Suspend warranty period while defects are addressed
- Issues addressed at no additional charge
- Specify conditions for full refund during initial warranty period

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WARRANTY

Licensor warrants for one (1) year from the date on which the Software is Accepted by Licensee, [or is first used in production by Licensee]*, that the Software will perform in all material respects the functions at the specified performance standards described in the Documentation and Standards of Performance, when operated on a Supported Platform. Documentation and Standards of Performance are defined as the Licensor's standard product documentation, the Licensee's RFP form with Licensor's RFP responses attached hereto, Licensee's Functional and Technical Requirements and Gap Analysis report attached hereto, Licensee's Features and Benefits document attached hereto, all said attachments being made a part hereof. ****[NOTE: Contracting Officer should select Acceptance or Productive Use as the start date of Warranty.]***

B. Notwithstanding Licensor's disclaimers or attempts to disclaim certain warranties, the provisions of FAR 52.212-4 (Contract Terms and Conditions – Commercial Items) apply to this Agreement, including FAR 52.212-4(o) pertaining to warranties as follows: "The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract."

C. In the event Licensee determines that the Product is a Non-complying Product during the one-year period specified above, Licensee will notify Licensor and Licensor will have ____ business days thereafter to begin remedying the non-conformance. If Licensor is unable to remedy such non-conformance within a reasonable time, Licensor agrees that Licensee may return the Product and Licensor shall

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CUSTOMER VIEWS

- Product assurance
- Free from bugs & defects
- Meet requirements
- Functionality
- Performance

Publisher



VENDOR VIEWS

- Limit liability
- Short duration / time
- Reasonable standards
- In their control
- Revenue recognition

EULA Key Clauses / Warranty

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Seller's Tactics to Limit Warranty Exposure

Implied

- Disclaim implied warranties using language in the EULA

Express

- Limit liability via integration clause
- No express warranty
- Limit warranty to perform per seller's documentation
- Limit warranty to short duration
- Limit remedies

EULA Key Clauses / Warranty

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Vendors' Perspective:

- Impose commercial clauses on government
- Take our commercial warranty because you are buying a commercial item per FAR Part 2 Definitions.

Best Government Perspective is to Negotiate Warranty and Not Just Accept the Vendor's Clause

- Commercial practice includes negotiation of warranty provisions.
- FAR Part 12: Serve the “best interests of the government” & comply with law
- The DoD Warranty Guide says warranty is as important as price and encourages negotiation.

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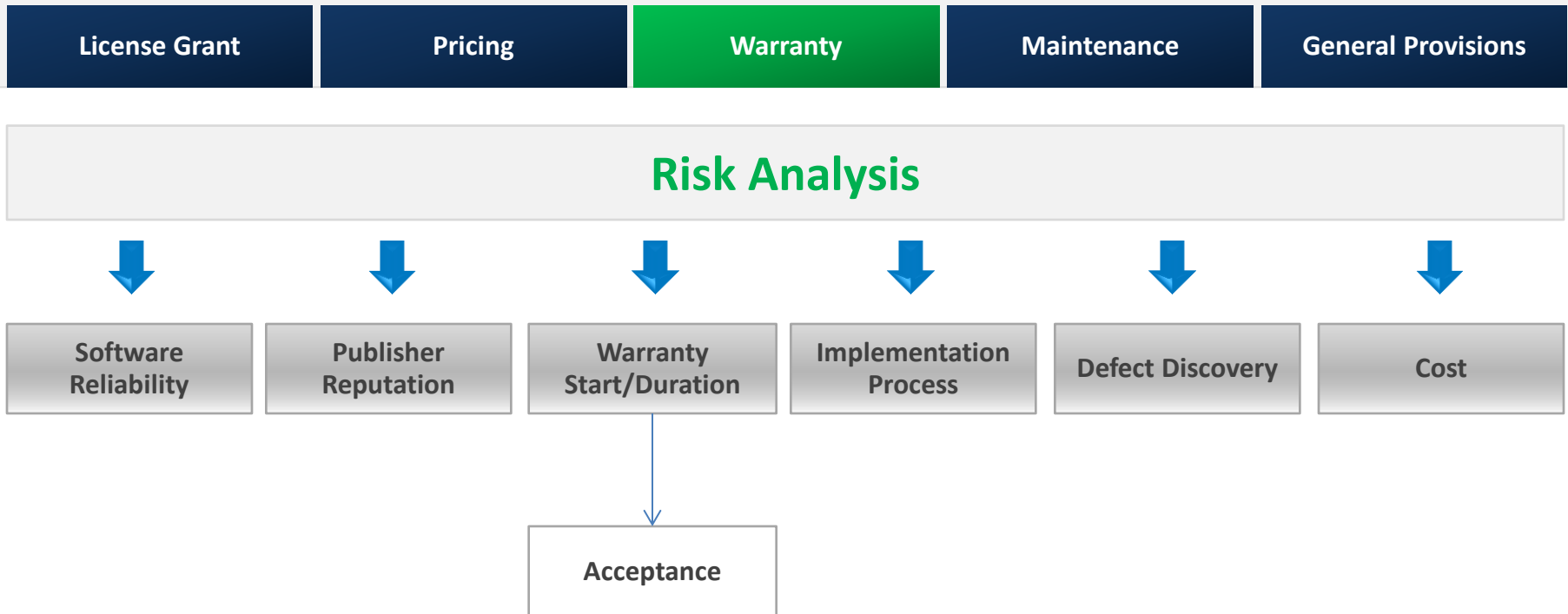
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EULA Key Clauses / Warranty



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Scope & Levels
of Support



Product
Entitlements



Support
Services



Timing &
Duration



Rates



Escalation

EULA Key Clauses / Maintenance

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Different Levels

Different Names

Be Familiar with Each Product and the Levels Available

Choose the Level that Best Fits Your Requirements

EULA Key Clauses / Maintenance

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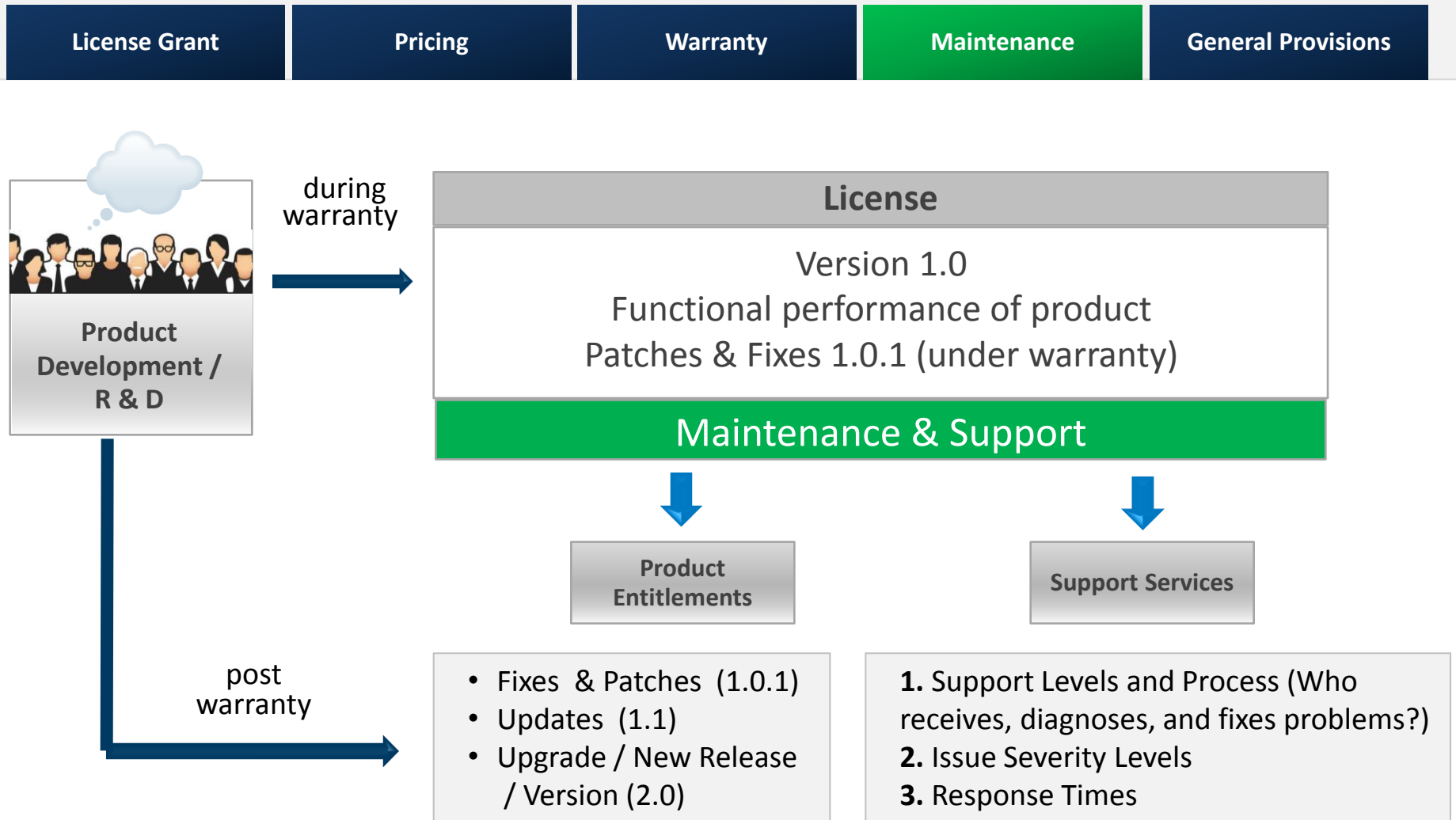
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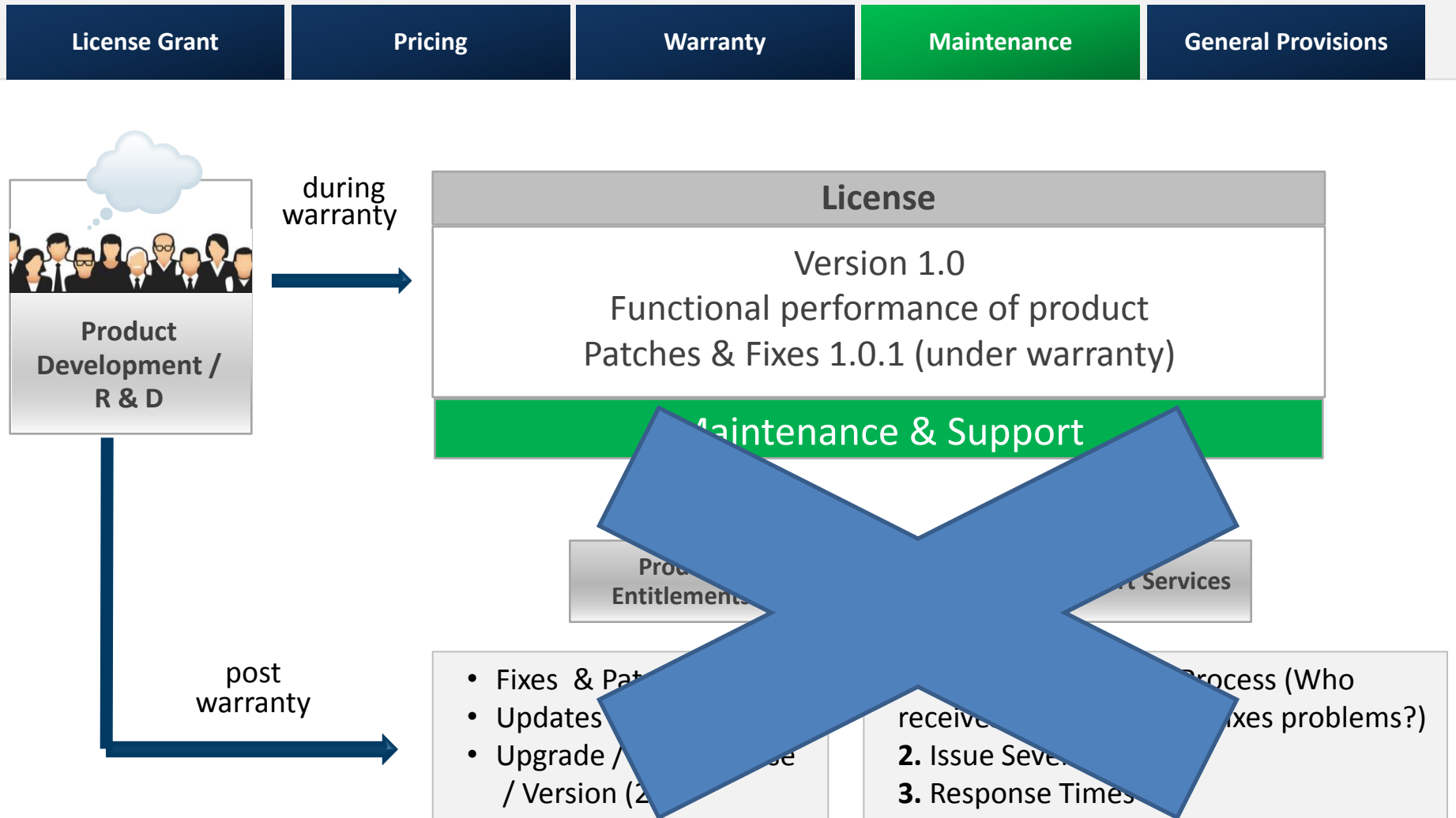
MAINTENANCE

Licensor shall provide maintenance and support services for one (1) year from the date on which the Software is Accepted by Licensee so that the Software will perform in all material respects the functions at the specified performance standards described in the Documentation and Standards of Performance, when operated on a Supported Platform. Documentation and Standards of Performance are defined as the Licensor's standard product documentation, the Licensee's RFP form with Licensor's RFP responses attached hereto, Licensee's Functional and Technical Requirements and Gap Analysis report attached hereto, Licensee's Features and Benefits document attached hereto, all said attachments being made a part hereof.

EULA Key Clauses / Maintenance



EULA Key Clauses / Maintenance



EULA Key Clauses / Maintenance

License Grant

Pricing

Warranty

Maintenance

General Provisions



Support Levels

Who receives, diagnoses and fixes the problem?

User



*Help
Desk*



1

*Product
Experts*



2

*Development
Team*



3

Support Levels

EULA Key Clauses / Maintenance

License Grant

Pricing

Warranty

Maintenance

General Provisions



Severity Levels and
Response Times

Issue Severity	Response Time to Acknowledge Issue	Response Time to Fix Issue
Level 1 (Low) No significant impact on users.	Return call or email within 8 hours.	Provide fix within 30 days.
Level 2 (Moderate) Causes some user issues, but most processes are functional.	Return call or email within 4 hours.	Provide fix within 5 days.
Level 3 (High) Significant impact on system use.	Return call or email within 1 hour.	Provide fix ASAP—24 hours or less.

EULA Key Clauses / Maintenance

License Grant

Pricing

Warranty

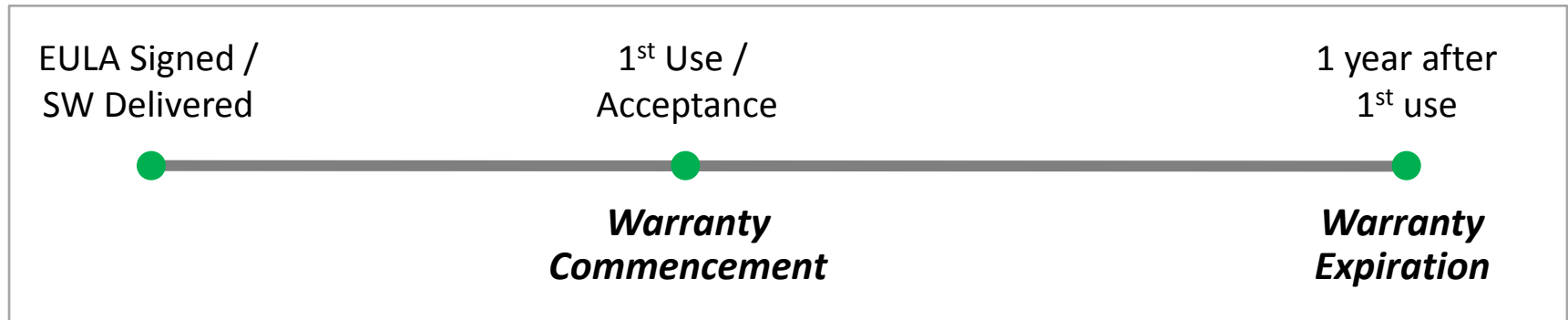
Maintenance

General Provisions

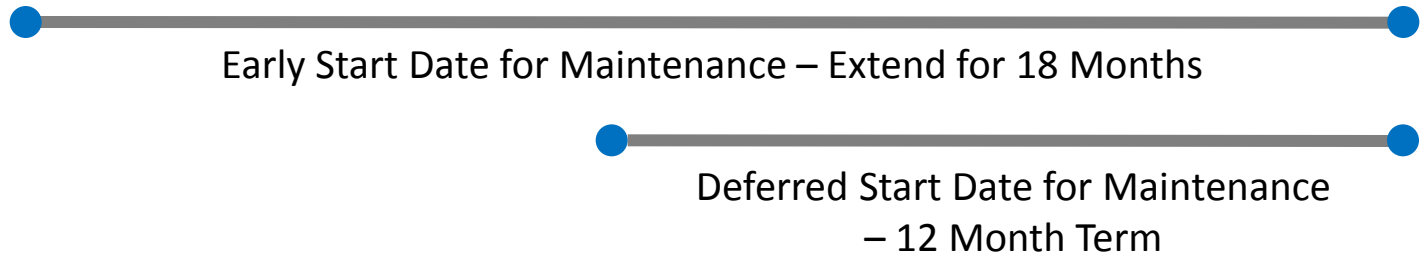


Timing and
Duration

Warranty in EULA



Maintenance



EULA Key Clauses / Maintenance

License Grant

Pricing

Warranty

Maintenance

General Provisions



Rates

Escalation

Initial Maintenance Fee Range

18-22% of
net license fees (NLF)






Research the vendor's practices,
and negotiate the lowest
percentage possible under the
most favored customer clause.

Escalation on Maintenance Fee

0% for first two years
2% each year thereafter

Limit your annual escalation
to a published economic index
(e.g. 2%), and try to achieve an
initial period of no escalation
(perhaps 1 or 2 years).

Important Issues for the Government re Maintenance

-  Opting out of Maintenance may save money in the short term, but probably not in the long term.
-  The color of money can be important – is Maintenance a Product or a Service?
-  Publishers may try to release a major change/version as a “New Product”, not included under S/W Maintenance and requiring new license fees.
-  Also watch for combining existing programs into a “New Product”. Example; separate programs a, b, and c get combined into product D, which must be bought if you don’t already license all three (a, b, and c).
-  **Check with Industry Analysts to determine whether these practices are acceptable industry-wide.**

Maintenance & Support Agreements

SLAs for Response Time to Reported Issues

- Refers to the requirement imposed on the Contractor for responding to Customer reports of deficiencies.
- Usually contained in packaged offerings from Contractor with response tied to severity of the issue.

SLAs for System Performance

- Refers to system performance as delivered by a hosting provider.
- Usually expressed as a percentage of system availability out of total potential availability.
- Levels of service can vary significantly.

Selecting the Right Package

- Because higher SLAs can be expensive, the Customer should weigh carefully the need for quick response time or substantial availability.

EULA Key Clauses / Maintenance

License Grant

Pricing

Warranty

Maintenance

General Provisions



ESI White Paper



Comparing Warranty & Maintenance

License Grant	Pricing	Warranty	Maintenance	General Provisions
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	Licensed Product Warranty	Maintenance & Support
Price / Cost	Warranty Cost is included in Initial License Fee; fix defects at no cost	Cost is in addition to Initial License Fee
Coverage	Software capabilities and performance standards will be met	Commitment to fix defects; meet service levels
Product Entitlements	Fixes & Patches (1.0.1)	Fixes & Patches (1.0.1) Updates (1.1) Upgrade / New Release / Version (2.0)
Timing	During defined warranty period; can run concurrently with Maintenance	Can start at time of entering license or first use of software;
Remedies	Fix defect / return product for refund	Fix Defect

EULA Key Clauses / General Provisions

License Grant

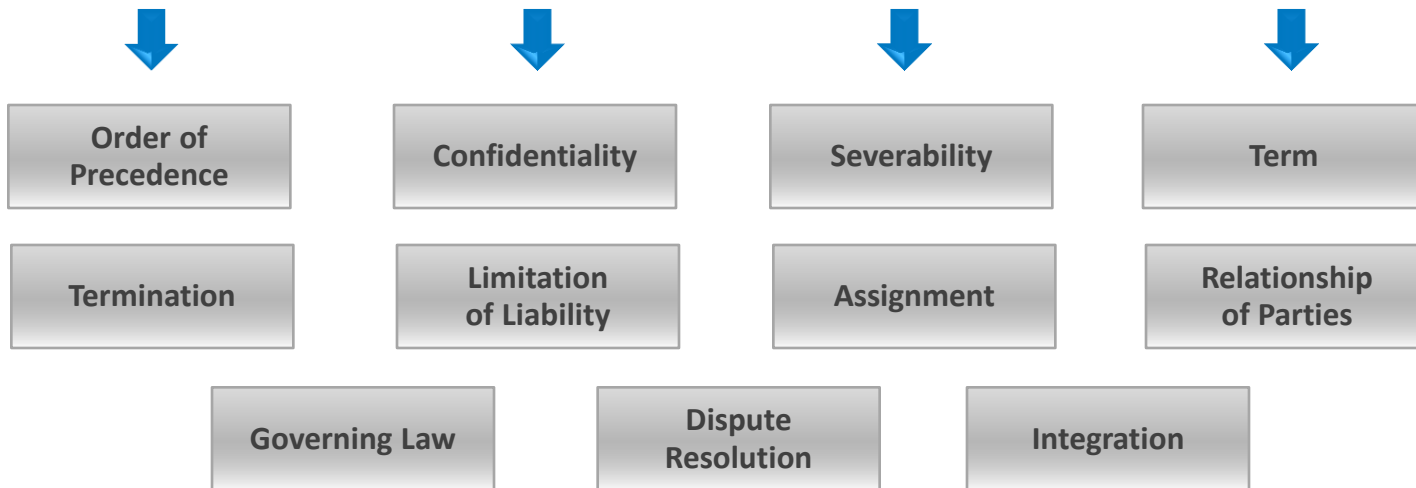
Pricing

Warranty

Maintenance

General Provisions

Sample Clauses



FAR and DFARS

The Commercial approach to General Provisions often contradicts rights granted to the Government in FAR and DFARS. DO NOT OVERLOOK THESE CLAUSES!!

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

Maintenance

General Provisions



Order of
Precedence

- Order of Precedence (OOP) is used to reconcile contradictions among the documents or clauses of a EULA.
- Commercial companies negotiate this and usually allow the more specific document or clauses to overrule less specific ones.
- FAR 52.212-4 (s) specifies OOP for Government license agreements, starting with the GSA FSS.
- Does the GSA FSS provide the most specific terms and conditions?

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

Maintenance

General Provisions



Termination

- Commercial agreements spend lots of space on defining the conditions that justify a termination by either party.
- Those agreements then use even more space defining what happens to the parties when a termination occurs, including the adjudication of disputes.
- FAR 52.212-4 (l) & (m) provide the Government with powerful termination rights.
- The Government can terminate for cause or convenience.
- A termination for cause that fails to show adequate cause can be considered a termination for convenience.

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

Maintenance

General Provisions



Dispute
Resolution

- Most Commercial agreements specify dispute resolution mechanisms.
- These often include some form of arbitration and conditions for suing in a court of law.
- Once again, FAR provides the Government with very powerful rights including:
 - See FAR 52-212-4 (d) and the Disputes Act of 1948
 - Disputes must be referred initially to the Contracting Officer for resolution. See FAR 52-233.1 for the specific process.
 - The Contractor must continue performance of contract obligations until the dispute is fully resolved.

EULA Key Clauses / General Provisions

License Grant

Pricing

Warranty

Maintenance

General Provisions





Governing Law

- Most Commercial agreements include a Governing Law or Choice of Laws clause.
- Those clauses usually specify that unresolved disputes will be heard in the state courts where one party is headquartered – (usually the Publisher's home state in the case of software licenses) – and that state's laws will be applied.
- FAR and DFARS specify that unresolved disputes will be heard in Federal Court and that federal law will be applied.

ESI Tools

Prepared by DoD ESI | 2015

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Home » Courses » Commercial Software


Commercial Software

Chapter Overview	Industry Overview	Products/Pricing	Software Contracts
<ul style="list-style-type: none">Course Overview & AgendaGlossary / Acronyms	<ol style="list-style-type: none">Software Industry EcosystemSoftware Publisher Organization & OperationSoftware Publisher Sales Strategies & Tactics	<ol style="list-style-type: none">Software Publisher Products & ServicesPricing ModelsESI Pricing Portal DemoPricing Benchmark PPT	<ol style="list-style-type: none">Contract Terms & ConditionsEnd User License Agreements (EULAs)Source Code EscrowOverviewSource Code Escrow Process
Software Management	Implementation	Ordering	BPA Management
<ol style="list-style-type: none">Software Self AuditSelf Audit ChecklistIT Asset Management	<ol style="list-style-type: none">Software Implementation Services & AgreementsCloud / SaaS Deployment ModelsSaaS ToolkitCloud-Based System Contract ArticleCloud Computing White Paper	<ol style="list-style-type: none">Best Value ToolkitBest Value TCO IntroductionBest Value TCOOrdering Off DoD ESI BPAsSoftware Buyers ChecklistOrder Level Acquisition Strategies & Best Practices	<ol style="list-style-type: none">BPA Toolkit (reserved for ESI KOs & SPAs only)

Course Categories

- ESI Overviews & Strategies
- Commercial Software
 - Half-Day Focused Workshops [Click Here](#)
 - Blanket Purchase Agreements

Training Categories: [ESI Overviews & Strategies](#) | [Commercial Software](#) | [Workshops](#) | [Blanket Purchase Agreements](#)



DoD ESI: Your Preferred Source for IT Acquisition Across the DoD

[DoD ESI Website »](#)

This is an official Department of Defense Web Site (GILS Registration #11398) sponsored by the Department of Defense Chief Information Officer (DoD CIO).

DoD ESI Tools: eLearning Tutorials



Training Videos



Chapter 1

Related Tools:

[IT Pricing White Paper](#)

[Self -Audit Checklist](#)

[Enterprise Licensing Checklist](#)

[Software Buyers Checklist](#)



Chapter 1



Chapter 2



Chapter 3



Chapter 4



Chapter 5



Chapter 6



Chapter 7



Chapter 8

Up to 8 Modules per Chapter

- Industry Overview
- Products & Pricing
- License Agreements
- Asset Management
- Implementation
- Ordering
- Best Value

DoD ESI Tools: HTML Toolkits and Software Buyer's Checklist

Best Value Toolkit

The screenshot shows the homepage of the DoD ESI Best Value Toolkit. At the top is a navigation bar with links: Home, Overview, How to Use, Rapid Assessment, Best Value Roadmap, and Tools Library. Below the navigation bar, there's a section titled "Best Value Toolkit Commercial Software Acquisition" with a checkmark icon. To the right of this section are links for "Rapid Assessment" and "Best Value Roadmap". Below this is a "Total Cost of Ownership (TCO)" section with a diagram showing three components: REQUIREMENTS / FIT, PRICE, and TERMS & CONDITIONS. To the right of the diagram, there's text explaining that the toolkit represents commercial best practices combined with DoD ESI's experience. Below the text are two photos: one of a man in a suit and one of a group of people smiling.

BPA Toolkit

The screenshot shows the "BPA Toolkit for KOs and SPMs" page. At the top is a navigation bar with links: Overview, Business Model, Implementation, Cost Analysis, Agreements, and Glossary of Terms. Below the navigation bar is a section titled "BPA Toolkit for KOs and SPMs". This section contains a table with six phases: Phase 0: Consideration, Phase 1: Presentation, Phase 2: Preparation, Phase 3: Agreement, Phase 4: Kick Off, and Phase 5: BPA Management. Each phase has a list of activities. Below the table is a section titled "Key ESI Activities are in blue type" with two photos: one of a man and a woman in a meeting, and one of a group of people standing together.

Phase 0: Consideration	Phase 1: Presentation	Phase 2: Preparation	Phase 3: Agreement	Phase 4: Kick Off	Phase 5: BPA Management
<ul style="list-style-type: none">• Overview• Consideration & Prerequisites Criteria• Process & Roles• Set Meeting• Discussion• Decision	<ul style="list-style-type: none">• Presentation to ESI Team• Evaluation• Approval• Component lead• SPM and KO Notification	<ul style="list-style-type: none">• Key info & docs• Validation• Acq. Strategy• Approval	<ul style="list-style-type: none">• Solicitation docs• eBuy or FBO• Evaluate offers	<ul style="list-style-type: none">• Web Site• Outreach Materials• Sales training	<ul style="list-style-type: none">• PMRs• Updates• Sales Reporting

Software Buyer's Checklist



SaaS Toolkit

The screenshot shows the homepage of the DoD ESI SaaS Toolkit. At the top is a navigation bar with links: Overview, Business Model, Implementation, Cost Analysis, Agreements, and Glossary of Terms. Below the navigation bar is a section titled "Software as a Service (SaaS) Toolkit". Below this section is a large cloud graphic. To the right of the cloud graphic is a section titled "Software as a Service (SaaS) Toolkit" with a subtitle "Deployment alternative to perpetual licensing". Below this is a welcome message and a description of the toolkit.

Software as a Service (SaaS) Toolkit
Deployment alternative to perpetual licensing

Welcome to the Software as a Service (SaaS) Toolkit. The Department of Defense Enterprise Software Initiative (DoD ESI) developed this SaaS Toolkit to provide educational materials for the DoD IT acquisition and management community in an independent, unbiased manner. This toolkit provides access to decision-analysis tools and contract-related forms to streamline the process of understanding, evaluating and acquiring SaaS offerings through the DoD ESI.

DoD ESI Tools: White Papers

IT Virtualization Technology

Cloud-Based Software Contracts

Open Source Software

Third Party Software

Software Warranties

Software Maintenance

SLA

License Grant

IT Virtualization Technology and its Impact on Software Contract Terms

Contractual protections to consider before taking advantage of popular virtualization technology solutions.



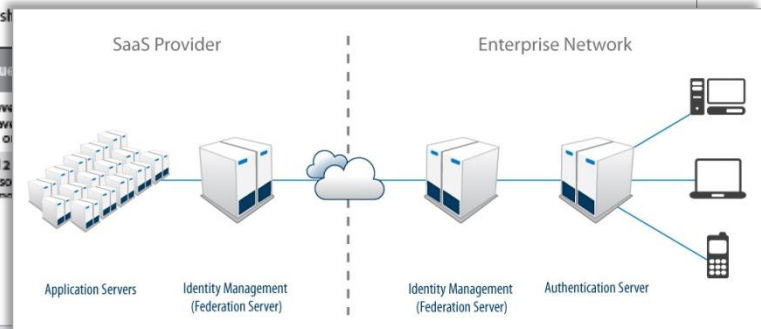
There are three basic types of SLAs in SaaS licenses—one related to the performance of the hosted environment, and two related to maintenance and/or support:

- 1) System availability (i.e. the performance of the hosted environment);
- 2) Response times to reports of software faults (i.e. support);
- 3) Response times for providing fixes to actual software faults (i.e. maintenance and support).

The following table provides an example for calculating system availability.

Criteria	Measurements	Comments
Minutes in a 90 day period	129,600 minutes	
Planned down time (assume 18 hours)	1080 minutes	This is a standard amount of time for system maintenance
Remaining minutes for scheduled up-time	128,520 minutes	
SLA	99.9%	This is a moderate standard; 5 nines (99.999%) is very high
of expected up time	128,391.5 minutes	
Available minutes (planned downtime)	128.52 minutes ~ 2.1 hours over 90 days!	Little time for unplanned down time
Penalties	Varies	Usually a credit is given for missing the SLA

Please note this example is based on a three-month period, assuming planned downtime of 18 hours for system maintenance and upgrades. Scheduled uptime is the time remaining after subtracting planned downtime from the total number of minutes available in a three-month period. The specified service level is expressed as a percentage of scheduled uptime (in this case, 99.9%).



DoD ESI Tools: Vendor Outreach Tools

CD available
to participating
DoD ESI IT vendors



Vendor Outreach Tools

DoD ESI has developed this page for ESI vendors to view, access and download outreach related tools and templates to assist the vendor in promoting and educating the DoD IT buying market about the use of the ESI contract vehicles.



Placard



For use at tradeshows and other events to display the vendor's association with ESI.

[Order](#)

Inserts



For general use with the DoD IT buying community to educate them on the use of ESI to streamline the acquisition process.

[Download](#)

PowerPoint



For general use with the DoD IT buying community to educate them on the use of ESI to streamline the acquisition process.

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PR Templates



To announce the establishment of the ESI BPA and any key milestones or events associated with the BPA.

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Emblems



To represent the vendor's association with ESI as a BPA awardee.

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Web Banners



For use in promoting the ESI vehicle on various web sites; to supply a link the ESI web site to learn more about the use of ESI.

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Training Information on DoD ESI Web Site

Please visit the ESI web site to:

- Register for ESI training
- Provide training feedback
- Request a consultation with an ESI Software Licensing SME
- Download training materials

Questions and Feedback (Survey)